United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1732

To be argued by
MICHAEL B. MUKASEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1732

UNITED STATES OF AMERICA,

Appellee,

—v.—

AL MARTIN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

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Preliminary Statement

Al Martin appeals from a judgment of conviction entered on March 28, 1974 in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 73 Cr. 814, filed August 22, 1973, charged Martin and a John Doe defendant in one count with bank robbery in violation of Title 18, United States Code, Sections 2113(a) and 2.

The trial began on February 26, 1974 and ended on March 1, 1974 when the jury found Martin guilty as charged. On March 28, 1974 Martin was sentenced to fifteen years imprisonment. He is now serving his sentence.

Statement of Facts

A. The Government's Case

On August 16, 1972, three armed men robbed the Chase Manhattan Bank at 102nd Street and Second Avenue of $4,553.05 (Tr. 10-12; GX 12).* One of the men—Charles Christopher Johnson—held the bank guard at gunpoint (Tr. 11, 53). Another—John Witherspoon**—vaulted the counter and rifled the tellers' cash drawers (Tr. 12, 153). The third—the defendant Martin—covered the platform area of the bank where the officers' desks were located, pushing a secretary against the rear wall of the bank (Tr. 11, 45-48, 153).

The three made their escape in a car, driven by a fourth man, which had been stolen from one Alphonse Pecorora approximately two weeks earlier in New Jersey by Johnson and another individual. Pecorora's wallet, containing various credit cards, was stolen at the same time (Tr. 65-68, 74-77, 80-83, 92-96, 103-104, 161-164; GX 5A, 5B, 5C).

Nine days after the robbery, on August 25, 1972, as Johnson, Witherspoon and Martin were traveling on the East River Drive in a car driven by Martin, they were approached by an unmarked police car containing two uniformed policemen, who signaled to them to pull off the highway. After Martin acknowledged the order by nodding his head, he did not pull off immediately but instead signaled to the policemen to pull alongside his vehicle. When they did so they were shot at from the car and a chase ensued (Tr. 164-165, 225-228). When Martin finally

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* "Tr." refers to the trial transcript; "S Tr." refers to the transcript of Martin's sentencing; "GX" and "DX" refer to Government's and Defendant's exhibits, respectively.

** Witherspoon was tried and convicted of bank robbery before Judge Pollack in April 1973. His conviction was affirmed without opinion. 487 F.2d 1393 (2d Cir. 1973).

stopped the car, one of the policemen, Robert O'Riley, saw two of its occupants, apparently Martin and Johnson, "fiddling with something from the back of the car" (Tr. 228-229). The third occupant, Witherspoon, ran and was caught by Officer O'Riley. After he caught Witherspoon, O'Riley returned to the car and found near a rear door a suitcase containing "three sawed-off shotguns and a 38-caliber revolver and extra ammunition for everything" (Tr. 229-230).

One of the shotguns and the revolver recovered from the suitcase were identified by Johnson as the weapons he and Witherspoon had been carrying during the bank robbery nine days before the shootout with the police (Tr. 159, 230; GX 8, 9).

Subsequently, Martin left the country (GX 16), after writing a letter to his neighbor telling her to dispose of the possessions in his apartment (DX A). One of the items found in Martin's apartment by the neighbor, Ruby ("Automatically called 'Peaches'" [Tr. 106].) Lee, was a credit card that was among the credit cards that had been stolen from Pecorora two weeks before the bank robbery at the same time as the theft of the getaway car (Tr. 103-104, 108-109). Miss Lee gave the credit card and Martin's letter, in which he had said he was leaving to accept "a teacher's position in a good Southern college", to a New York City detective who turned them over to the FBI (Tr. 109-110, 121-123, 260).

B. The Defendant's Case

The defendant called no witnesses.

C. The Verdict

After four hours of deliberation, the jury reported it was unable to reach a verdict (Tr. 382, 385-386). The trial judge refused to accept the report of a deadlock, but

dismissed the jury for the evening with deliberations to resume the following day (Tr. 386-387). He advised them that if they did not reach a verdict the case would have to be retried with "the same problems, trouble and expense of redoing anything" (Tr. 387). Defense counsel objected and was invited to submit a curative charge the next day (Tr. 389); he did not do so. The jury returned the next day, asked for a rereading of the testimony of three witnesses and, following that rereading, convicted the defendant (Tr. 390-391).

ARGUMENT

POINT I

It was not error to receive evidence of other crimes, which evidence was clearly relevant to the issues at trial.

Martin claims reversible error in the admission of testimony relating to the theft from Pecorora, approximately two weeks before the bank robbery, of the getaway car and the credit card found in Martin's apartment, and in the admission of testimony about the shootout and chase nine days after the robbery. The claim is without merit. The evidence concerning both the theft of the car and credit card and the circumstances surrounding the shootout with the police, connected the defendant with the specific bank robbery charged in the indictment and were not offered to prove the defendant's criminal character or disposition. *United States* v. *Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973).

With respect to the theft of Pecorora's car and credit card, the proof showed that Johnson and another person stole the two items at the same time (Tr. 102-104, 163-

164), that the car was used in the robbery (Tr. 65-68, 74-77, 80-83), and that the credit card was recovered from Martin's apartment (Tr. 108-109). With the car an integral part of the robbery and the credit card stolen at the same time as the car and from the same person, and later recovered in Martin's apartment, the theft of the car and credit card helped connect the defendant with the bank robbery and was admissible. *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir. 1973), *cert. denied* — U.S. — (1974) (proof of bank robbery defendant's participation in prior uncharged bank robberies was proper to link the defendant with those accomplices who testified to his role in the robbery.) *Cf. United States* v. *Eustace*, 423 F.2d 569, 571 (2d Cir. 1970) (testimony admissible to show defendant had access to car resembling getaway car); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945) (testimony tending to connect defendant with crime charged admissible though it involves proof of crime not charged). It should also be noted that there was no testimony connecting Martin to the commission of the auto and credit card thefts, and a limiting instruction to this effect was given to the jury (Tr. 105).

With respect to the shoot-out with the police on the East River Drive, the proof showed that Martin was driving a car that contained weapons used in the robbery as well as the two other defendants who used them (Tr. 159, 230); that when Martin was directed by the police to pull off the highway he did not do so but motioned to them to pull alongside, that they did so and were met by gunfire; and that Martin then drove off with the police in pursuit (Tr. 164-165, 225-228). Martin's participation in a blatant act of resistance and flight is relevant and admissible proof of his consciousness of guilt, see *United States* v. *Ayala*, 307 F.2d 574 (2d Cir. 1962); 2 Wigmore, EVIDENCE, Section 276 (3d ed. 1940), and, considering the presence of the guns used in the robbery, is corroboration

of his identity as a bank robber as well, see *United States* v. *Fisher,* 455 F.2d 1101, 1103-1104 (2d Cir. 1972); *United States* v. *Ravich,* 421 F.2d 1196, 1203-1204 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970); *United States* v. *Baker,* 419 F.2d 83, 86-87 (2d Cir. 1969), identity having been the sole issue in the case (Tr. 315).

POINT II

Defendant's claim that the weapons were inadmissible is frivolous.

Defendant argues that it was error to admit into evidence the shotgun and pistol (GX 8 and 9) because Officer O'Riley did not have them under continuous observation and because he did not testify that the defendant had them in his possession (Martin Brief p. 28). The claim is frivolous.

The weapons were identified by Johnson as those carried by himself and Witherspoon during the bank robbery (Tr. 159) and were found next to the car the defendant was driving when shots were fired at the police (Tr. 230) in the same vicinity where Martin and Johnson had been "fiddling with something" when the police car pulled up following the shooting and the chase (Tr. 228-229). No testimony was elicited to suggest either that Johnson was uncertain in his identification of the weapons or that someone else had happened by and left the suitcase at the scene at approximately 1 a.m. (Tr. 225) near the car the defendant had been driving. Even in the absence of accomplice testimony directly linking the specific weapons recovered to the weapons used in the robbery, the guns would have been admissible had a witness to the crime (*e.g* a bank teller) simply testified to their resemblance to the weapons used to commit the crime. *United States* v. *Johnson,* 401 F.2d 746, 747-48 (2d Cir. 1968).

Here, the jury was entitled to conclude that the bank robbery guns had come from the defendant's car and they were therefore admissible. *United States* v. *Fisher, supra; United States* v. *Ravich, supra; United States* v. *Baker, supra.*

POINT III

There was no denial of due process in the trial judge's refusal to accept the jury's initial report of a deadlock.

The trial judge's comments to the jury when they reported themselves deadlocked after four hours of deliberation were not improper much less reversibly erroneous. The Court simply noted that if the jury did not reach a verdict the case would have to be retried. He made no suggestion that they yield their conscientious convictions or even reconsider their positions, or that a verdict would have to be reached, two features of the conventional *Allen* charge that have been criticized. *United States* v. *Martinez,* 446 F.2d 118, 120 (2d Cir. 1971). The sense of the trial judge's statements here has been approved by this Court. *United States* v. *Tyers,* 487 F.2d 828, 832 (2d Cir. 1973).

Moreover, the jury's verdict was obviously based on the testimony that was reread the day after the judge's comments, not on the comments themselves.

Finally, though defense counsel objected he apparently did not consider the matter sufficiently important to suggest curative language as he was invited to do by the judge (Tr. 389).

POINT IV

The District Court did not abuse its discretion or consider impermissible factors in imposing a fifteen-year jail sentence on the defendant.

Martin argues that his fifteen-year sentence, the same as the terms imposed on Witherspoon and initially on Johnson, was overly harsh and was mechanically imposed.* The argument lacks merit.

The evidence at trial showed that Martin helped rob a bank at gunpoint and that to avoid capture he later tried to lure two policemen to their death. Prior to imposition of sentence both the defendant and his counsel were given a full opportunity to make any comment they thought relevant either about the evidence or about the defendant's background (S Tr. 3-9). The sentence imposed on Martin was five years less than the statutory maximum. 18 U.S.C. Section 2113(a). In imposing sentence, Judge Pollack cited society's interest in deterring armed bank robberies (S Tr. 10) and mentioned also the defendant's own apparent lack of contrition and his condemnation of society for his own behavior (S Tr. 9-10, 11).

Upon such a record, there is no indication either that the sentencing judge manifestly abused his discretionary power, *United States* v. *Holder*, 412 F.2d 212, 214 (2d Cir.

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* Martin argues also that his sentence was "based upon the appellant's political beliefs" (Martin Brief, p. 14), a claim that conflicts with the assertion that the sentence was mechanically imposed with no regard for differences between this defendant and other bank robbers, and also with the fact that Witherspoon and Johnson, whose politics appear nowhere in the record, received the same sentence. In fact, all three participants in the robbery had similar backgrounds, including substantially clear records and military service.

1969) or that in imposing sentence he relied upon constitutionally impermissible considerations. *United States* v. *Driscoll*, Dkt. No. 73-2005 (2d Cir., May 6, 1974) Slip Op. at 3261-3262. Absent such factors, there is no occasion for this Court to review Martin's sentence. *Dorszynski* v. *United States*, — U.S. — 42 U.S.L.W. 5156 (June 26, 1974).

CONCLUSION

The judgment of conviction and the sentence imposed pursuant thereto should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JOHN D. GORDAN III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of August, 1974 he served ~~a copy~~ 2 copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Ozro Thaddeus Wells, Esq.
377 Broadway -- Suite 1107
New York, N.Y. 10013

And deponent further says that he sealed the said envelope and placed the same in the ~~mail~~ box ~~drop~~ for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this
7th day of August, 1974

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975